United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 14-1945**
	)	**Issued: August 17, 2015**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE BARSTOW -- YERMO ANNEX, Yermo, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 8, 2014 appellant timely appealed the June 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant sustained an occupational disease in the performance of duty on or about October 3, 2012.

FACTUAL HISTORY

Appellant, a 52-year-old former painter, filed an occupational disease claim (Form CA-2) on December 3, 2012 alleging that he injured his back while operating a forklift. He explained

[1] 5 U.S.C. §§ 8101-8193.

that on October 3, 2012 he was driving a forklift when he felt a pop, and then severe pain in his mid and low back. Appellant also experienced numbness and pain in his right forearm. He reported that he had been driving a forklift for more than a year and all the jarring, bouncing, and road bumps damaged his back. Appellant stopped work on October 3, 2012. He has a previously accepted occupational disease claim for a lumbar injury arising on or about May 20, 2008 (file number xxxxxx037). OWCP accepted the claim for lumbar disc displacement without myelopathy and lumbar spinal stenosis. On July 9, 2008 appellant underwent a decompressive laminectomy with instrumentation and fusion at L2-S1. He also has an accepted claim for a July 28, 2009 traumatic injury involving the left hip/thigh and left pelvic region (file number xxxxxx086).[2]

Dr. John C. Steinmann, a Board-certified orthopedic surgeon, initially examined appellant on October 13, 2012. He noted that appellant was a forklift driver with complaints referable to his lumbar spine. Dr. Steinmann also noted a prior work-related lumbar injury on May 20, 2008, which resulted from lifting a heavy item while appellant worked as a painter. Appellant reported having been diagnosed with spinal stenosis, and after an unsuccessful period of conservative treatment he underwent spine surgery with instrumentation. Dr. Steinmann noted that appellant returned to work approximately four months after surgery. He also noted that appellant was treated for a left hip injury and had undergone hip replacement surgery. Dr. Steinmann further indicated that appellant reached maximum medical improvement (MMI) in April 2010 and was released. He had not received follow-up treatment for appellant's spine since his release. Appellant reported that, after he began driving his forklift on October 3, 2012, he felt a "pop" and an increase in low back pain. Prior to this incident, his low back pain was 8 on a scale of 1 to 10. Since then, appellant's pain was "15" on a scale of 1 to 10. He also reported grinding in his low back and tingling down his right arm. On physical examination, Dr. Steinmann noted tenderness in the lumbar spine and markedly diminished range of motion, but no motor or sensory deficits. Appellant's x-rays revealed pseudarthrosis at L2-3 with dislodged hardware and complete disc space collapse at that level. However, the remaining fusion from L3 to S1 appeared to be solid. Dr. Steinmann diagnosed status post L2-S1 posterior instrumented fusion and failed fusion at L2-3, with loose and dislodged hardware. He explained that the pop appellant felt in his back likely represented the final dislodgment of his hardware at L2-3. Dr. Steinmann recommended reconstructive surgery to include removal of the hardware from L2 to the sacrum, exploration of the fusion mass, and treatment of the pseudarthrosis at L2-3. He found appellant temporarily totally disabled.

In a January 21, 2013 supplemental statement, appellant indicated that he had been injured in May 2008 while working as a heavy armor painter and had undergone surgery in July 2008 to stabilize his lumbar spine. He also noted having undergone an OWCP-approved left total hip replacement in 2009. Appellant indicated that he returned to work in April 2010, but was unable to perform heavy armor painting. Because of his restrictions, the employing

[2] The complete records associated with appellant's May 2008 and July 2009 employment injuries are not currently accessible by the Board.

establishment assigned various other duties, including work as warehouse inventory specialist -- materials handler, which involved operating a forklift.[3] In August 2011, it reassigned appellant to work full time as a forklift operator in the mechanical heavy equipment (MHE) department. Appellant further stated that, while operating a forklift on October 3, 2012, he felt a "pop" and increased low back pain. He stated that he stopped work and reported the incident to his supervisor. Appellant later sought treatment from Dr. Steinmann, who diagnosed failed fusion at L2-3 and dislodgment of hardware at L2-3, and recommend further lumbar surgery.

Appellant attributed his latest lumbar complaints to his duties as an MHE forklift driver. He explained that he operated a forklift for approximately nine hours each day and drove to all areas of the base transporting parts, and supplies among various departments. The terrain appellant covered included dirt roads, uneven roads, broken pavement, and maneuvering up and down ramps. Appellant stated that there was an extreme amount of bouncing, jarring, and vibrating when operating the forklift, which had no suspension. He claimed that operating a forklift over extreme road conditions since August 2011 caused his current back problems.

In a January 21, 2013 report, Dr. Steinmann reviewed his initial findings and surgery recommendation from October 13, 2012. He noted that the requested lumbar surgery had not yet been authorized. Dr. Steinmann also noted appellant's description of his forklift operator duties, which included driving to all areas of the base over "dirt roads, uneven roads, broken pavement, and maneuvering up or down ramps." He stated that appellant's forklift operator position was probably in excess of his work restrictions, which required "sedentary work." Dr. Steinmann reiterated that, while driving a forklift appellant heard a pop and experienced increased pain, and afterwards, appellant was noted to have dislodgment of his superior set screws at L2-3, indicating an L2-3 pseudarthrosis. He stated "It appears that [appellant] has aggravated or accelerated the failure at L2-3 by performing duties as a forklift driver as opposed to following sedentary work restrictions." Dr. Steinmann continued to find appellant temporarily totally disabled.

In a decision dated March 15, 2013, OWCP denied appellant's occupational disease claim. It found Dr. Steinmann's January 21, 2013 report insufficient to establish a causal relationship between appellant's current lumbar condition and his duties as a forklift operator.

On February 28, 2014 appellant requested reconsideration.[4] OWCP received his request on March 11, 2014.

Additional evidence submitted since the March 15, 2013 decision included follow-up progress reports from Dr. Steinmann dated February 9 and March 15, 2013. Dr. Steinmann continued to find appellant totally disabled and reiterated that the need for further surgery to

[3] Appellant submitted May 20, 2010 work restrictions from Dr. Joseph E. Tauber, a Board-certified orthopedic surgeon, who referenced appellant's May 2008 and July 2009 employment injuries and advised that he reached MMI under both claims. His "permanent" work restrictions included: (1) sedentary work only (2) no excessive walking or standing; (3) no bending, stooping, or squatting; (4) no lifting more than 10 to 15 pounds; and (5) must be allowed to change positions as needed for comfort.

[4] Appellant's former representative initially requested a review of the written record, which he later withdrew. On April 15, 2013 the Branch of Hearings and Review accepted his petition to withdraw the hearing request.

repair his pseudarthrosis at L2-3. In a March 15, 2013 progress report, he stated "It appears that [appellant's] back is an industrial injury and it also appears that he aggravated or accelerated the failure at L2-3 by performing duties as a forklift driver as opposed to following sedentary work restrictions."

In an April 25, 2013 report, Dr. Tauber indicated that appellant was permanently disabled from all employment. He noted that appellant was previously employed working on a forklift, and before that he had been a painter. Dr. Tauber reported continuing sciatic complaints. He also noted that appellant had previously undergone a total hip replacement and spinal surgery. According to Dr. Tauber, appellant could not even perform sedentary duties, and was a candidate for additional spinal surgery.[5]

OWCP also received two October 1, 2013 operative reports from Dr. Gowriharan Thaiyananthan, a Board-certified neurosurgeon. One report indicated that Dr. Thaiyananthan performed a lumbar interbody fusion at L2-3. The postoperative diagnoses included: L2-3 pseudarthrosis, L2-3 degenerative disc disease (DDD), L2-3 central canal stenosis, lumbago, and L2-3 lumbar radiculopathy. The other October 1, 2013 operative report noted that Dr. Thaiyananthan removed hardware at L2-S1, and performed a re-arthrodesis/fusion with instrumentation at T10 through S1. Appellant's postoperative diagnoses included: thoracolumbar degenerative disc disease ("DDD"), lumbosacral scoliosis, pseudarthrosis, mechanical hardware failure, and lumbago.

In an October 22, 2013 report, Dr. Thaiyananthan indicated that appellant had been under his care since June 2013, and had recently undergone surgery on October 1 and 7, 2013.[6] He referenced appellant's May 20, 2008 lumbar injury and subsequent surgery in July 2008, as well as appellant's July 28, 2009 left hip injury, and October 22, 2009 total hip arthroplasty. Dr. Thaiyananthan also noted the October 3, 2012 forklift incident when appellant felt and heard a "pop" in his back. Additionally, he described appellant's prior duties as a painter, and his status post April 2010 assignments as a warehouse materials handler. Dr. Thaiyananthan also noted appellant's position as an MHE forklift operator from August 2011 through October 3, 2012. He indicated that appellant had not worked since October 2012, and following his latest surgeries he continued to be totally disabled. Although he anticipated some improvement with appellant's pain level over time, Dr. Thaiyananthan indicated that, even with the recent corrective surgery, it was unlikely appellant would recover sufficiently to return to any type of gainful employment for the foreseeable future. Appellant's diagnoses included: thoracolumbar DDD, lumbosacral scoliosis, severe spinal stenosis, spondylolisthesis, lumbar radiculopathy, status post July 2008 spinal decompression and fusion at L2-S1, failed lumbar surgery syndrome with multilevel pseudarthroses and hardware failure, status post October 1, 2013 lumbar interbody fusion at L2-3, status post October 7, 2013 extreme lateral interbody fusion and T10-S1 hardware removal and rearthrodesis, history of left hip avascular necrosis or osteonecrosis, and status post October 2009 total left hip arthroplasty. Dr. Thaiyananthan did not

[5] Although he did not specifically address the cause of appellant's current lumbar complaints, Dr. Tauber referenced claim file number xxxxxx037, with a May 20, 2008 date of injury.

[6] According to Dr. Thaiyananthan, the hardware removal at L2-S1 and rearthrodesis/fusion with instrumentation at T10 through S1 occurred on October 7, 2013, rather than October 1, 2013 as noted on the operative report.

offer an opinion on whether appellant's duties as an MHE forklift operator either caused or contributed to his current lumbar condition.

In a June 10, 2014 decision, OWCP reviewed the merits of the claim, but denied modification of the March 15, 2013 decision. It indicated that "none of the medical reports draw a connection between [appellant's] back condition, the dislodged hardware and [his] forklift duties."

LEGAL PRECEDENT

A claimant seeking benefits under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[7]

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.[8]

ANALYSIS

Appellant appeals from a merit decision of June 10, 2014 which denied his claim of an occupational disease on or about October 3, 2012 due to his work-related duties. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden to establish entitlement to compensation; however, OWCP shares responsibility in the development of the evidence to see that justice is done.[9]

When Dr. Steinmann first examined appellant on October 13, 2012, he diagnosed failed fusion at L2-3 with loose and dislodged hardware. He recommended reconstructive surgery to address the hardware failure and the noted pseudarthrosis. Dr. Steinmann explained that the October 3, 2012 pop appellant felt in his back likely represented the final dislodgment of his hardware at L2-3. In his January 21, 2013 report, he noted that appellant's forklift operator duties involved driving to all areas of the base over "dirt roads, uneven roads, broken pavement and up or down ramps." Dr. Steinmann stated that it appeared appellant had "aggravated or accelerated the failure at L2-3 by performing duties as a forklift driver...." He made a similar statement in his March 15, 2013 progress report noting that it appeared appellant's back was an "industrial injury" and he apparently "aggravated or accelerated the failure at L2-3 by

[7] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996).

[8] *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *William J. Cantrell*, 34 ECAB 1223 (1983).

performing duties as a forklift driver as opposed to following sedentary work restrictions." Contrary to OWCP's finding, the record includes medical evidence that "draw[s] a connection between [appellant's] back condition, the dislodged hardware and [his] forklift duties." Although Dr. Steinmann did not provide a definitive statement on causal relationship, he nonetheless provided sufficient evidence of a link between appellant's employment and his current lumbar condition to require further development of the occupational disease claim. Moreover, the current record does not include any rationalized medical evidence attributing appellant's back condition to some other nonindustrial cause. Accordingly, the Board finds Dr. Steinmann's opinion sufficient to require further development of the record by OWCP.[10]

On remand, OWCP should double the current lumbar claim with appellant's previously accepted lumbar injury (file number xxxxxx037) and his previously accepted left hip/thigh and left pelvic region injury (file number xxxxxx068.[11] Also, it accepted his description of his MHE forklift operator duties without input from the employing establishment. OWCP should obtain a copy of appellant's latest position description and also verify whether his description of the forklift's lack of suspension and the base's terrain are accurate. After combining the records and obtaining additional factual information from the employing establishment, it should refer him to an appropriate specialist, along with the case record and a statement of accepted facts. OWCP referral physician should provide an evaluation and a rationalized medical opinion on whether appellant's current lumbar condition is causally related to his duties as a forklift operator or his previously accepted claims. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is not in posture for decision.

[10] *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8 (February 2000).

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2014 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: August 17, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board